No. 87-107

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BRENDA PATTERSON,
Petitioner,

v.

MCLEAN CREDIT UNION,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF CURTIS AND SANDY McCRARY SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the interpretation of 42 U.S.C. sec. 1981 adopted by the Court in Runyon v. McCrary, 427 U.S. 160 (1976) should be reconsidered?

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INTEREST OF THE AMICUS CURIAE

Sandra and Curtis McCrary are parents of a son, who at a preschool age, was denied admission to a private day care facility solely on the basis of his race. Finding that distinction unsatisfactory, the McCrarys filed an action in federal district court based on 42 U.S.C. sec. 1981. In 1976, this Court ruled that the McCrarys could use that statute to seek redress for harm caused from racial discrimination by private actions. That ruling allowed their son to grow in an atmosphere less charged by the necessary tensions created by invidious racial discrimination. Twelve years later, when this Court requested

reargument involving its earlier interpretation of 42 U.S.C. sec. 1981 (1982 and Supp IV), as set out in Runyon, the McCrarys decided to let this Court know the happier ending to their discrimination story resulting from the decision. Within this document's discussion of stare decisis is a statement from Mr. and Mrs. McCrary.

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BRIEF OF CURTIS AND SANDRA McCRARY AS AMICUS CURIAE SUPPORTING PETITIONER

Ms. Brenda Patterson, Petitioner here, has claimed that certain methods in which she was treated by her former employer and by co-workers at her former place of employment were racially

discriminatory and constituted a form of racial harassment. Petitioner pled that her racial harassment constituted a discrete violation of 42 U.S.C. Sec. 1981. The district court held that a claim for racial harassment is not cognizable under Sec. 1981. Patterson v. McLean Credit Union, ___ F.Supp. ___, 42 FEP Cases 659 (M.D. N.C. 1985). That holding was affirmed by the Fourth Circuit, finding that the right to establish a contractual relationship with an employer that is free of racial factors does not include the expectation of freedom from workplace racial harassment. Patterson v. McLean Credit Union, 805 F.2d 1143 (1986).

Petitioner Patterson claims that certain behavior to which she was subjected on her job created racial

harassment against her because she is black. That her incidents may not amount to a legal definition of harassment is not here at issue. That any behavior of racial harassmert may form the basis of a cause of action against her employer pursuant to Sec. 1981 is the issue addressed by Patterson.

Since the question is whether or not "racial harassment" of any ilk is redressable by 42 U.S.C. Sec. 1981, the particular circumstances of Petitioner Patterson's claim and her ability to prove them are not yet relevant. Further, since the question of whether such behavior falls within the contract between the parties seems answerable without reconsideration of Runyon v. McCrary, 427 U.S. 160 (1976), the activism in requesting such

reconsideration indicates that a decision far beyond the facts of Patterson is being considered.

Because of the limits of the Patterson grant of certiorari and the favored judicial policy of ruling narrowly when exercising the power of the judiciary, Amicus McCrary would first argue that reconsideration of the Court's prior decision is not necessary. The Court could render a fair determination, and even prevent an expansion of the scope of 42 U.S.C. sec. 1981, if a majority so determines, without the need to actively review settled law.

In Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), both Justice Powell, in concurrence (at p. 709 n. 6), and Chief Justice Rehnquist (then Justice), in

dissent (at p. 718), voiced the oft-spoken opinion that "this Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing." Much weight must be given by this Court to the reliance that citizens place on law properly pronounced by this Court. In this instance, the deterence felt by private citizens to harness racially discriminatory acts against others is undoubtedly due, at least in part, on the clear pronouncements spoken in Runyon. Others, of course, feel much safer since that decision. Can it possibly be that private racism, currently redressable in federal courts as reprehensible societal behavior, will no longer be mediated in our judicial system?

If one main tenet of our legal

system is that it provides an opportunity to effectively redress harm, then a system to determine whether an act or series of actions is harmful is required. That evaluation should employ the sensibilities of today's values and not those values based on the ambiguously discerned intent of a Congress more than one century past. 1/

1/ A jury, by definition, imposes the values of today. Sec. 1981 provides a jury trial, Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) and Title VII of the Civil Rights Act of 1964 does not. The elimination of sec. 1981 from the employment context may not interfere with the rights of an employee who has been the victim of racial discrimination at the hands of his employer from reaching court but it will interfere with his ability to have a panel of his peers judge those actions and greatly interferes with the desire of a company to settle the differences prior to a trial before a jury.
That sec. 1981 also provides for punitive damages not recoverable under Title VII is another aspect it has provided to eliminate discrimination in employment.

The concept that racial discrimination in any form is harmful to our society has been voiced by this Court on a number of occasions. For example, in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), reference was made to repeated Congressional assessments that eradication of racial discrimination was "a policy ... of the highest priority". This policy was again relied upon in Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). There can be little doubt that the elimination of racial discrimination is acknowledged as a proper judicial objective.

This concept of eradication of

1/ (Cont.) As Congress has repeatedly recognized, the deterent effect of monetary punishment is thought to be great. E.g., the award of treble damages for RICO Act violations, 18 U.S.C. sec. 1964(c) (1982 and Supp IV).

racial injustice as being of a high priority can also be discerned from the Court's repeated affirmation of the theory of private attorneys general. In providing a generous construction to the attorney fee provision of Title II of the Civil Rights Act of 1964, the Court approved the use of private attorneys general to attack discriminatory practices which it determined were adversely affecting not only blacks but all citizens. Newman, supra, 390 U.S. at 402. All of society benefits from the elimination of unjust racial distinctions. This was reiterated in a related way in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) where this Court granted standing to a white to challenge private racially discriminatory housing

practices. Each citizen is thought to suffer when racial discrimination is practiced, even if it is by the loss of association with other citizens of a slightly different background. The Court there repeated Senator Javit's comments indicating that race discrimination victimizes "the whole community...." 409 U.S. at 211.

A reading of these and related decisions of the Court demonstrates its collective belief that the harm caused by racial discrimination, of whatever type, pervades the entire fabric of our society and that its elimination is cause for monetary payments and other forms of judicially awarded relief. If this is so, the question then becomes whether Sec. 1981 provides a proper vehicle to accomplish this specific goal of society.

One valid method of assessment would be to learn of the effects of the Runyon v. McCrary decision from one party involved in that litigation. Sandra and Curtis McCrary participated in the legal process to attain for their son the same rights others of his age enjoyed. Now the progress that their determination wrought may be set aside. The following statement is set forth to indicate their feelings:

"Our prospective is as parents of Michael McCrary, who in 1972 at the age of two was denied admission to one of the private schools in Northern Virginia that were defendants in Runyon. That incident began a 4 1/2 year journey through the legal system, culminating in the Supreme Court's June 1976 decision.

"By the time the decision was rendered, Michael was in the first grade

of public school, so admission to the private daycare center was a moot issue. Having remained in the Virginia area, however, we've been able to observe the positive impact of the decision on the community.

"We are concerned that the recent move by the Court to revisit the Runyon decision could erode the progress realized in the past 12 years. We are worried, more specifically, that the Court's action may be a harbinger of an intent to retreat from what we believed and trusted were established precedents.

"For Michael, now 17 and about to enter his freshman year of college, Runyon v. McCrary is an abstraction -- an incident we've discussed with him, usually in the context of a school assignment on civil rights. As with many

other young black men and women born after the passage of the Civil Rights Act of 1964, much of the civil rights struggle seems so very removed from his reality.

"Michael's self-image is intact, not having been indelibly marked by the injustice and indignity of segregation. For his generation, the sons and daughters of the first beneficiaries of equal access to education, housing, and job opportunities, the American dream can in fact be realized.

"Of course, we do not delude ourselves: problems still exist. However, this does not diminish the significant social progress achieved as a result of hard-fought civil rights victories. Our nation can, and should, be proud of the advances made over the last 25 years

toward the elimination of racial discrimination, both public and private.

"With every successive victory, we as a people moved further away from a past that was shadowed by racial divisiveness. Today, even some of the most intractable foes of civil rights have acknowledged that the removal of racial barriers has enhanced the general welfare of our society.

"A key contributor to this progress has been our judicial system, and the willingness of the courts to interpret the law in a manner consistent with current concepts of social good. We believe that the intent of the legislators in passing the 1866 civil rights laws, in particular sec. 1981, the statute at issue in Runyon, was to extend to a people formerly disenfranchised by

slavery full rights as citizens of our nation.

"Fundamental to our society is the right to enter into contracts, whether for property or services. The extension of sec. 1981 to areas of private discrimination affecting equal access to housing, employment, and education was a logical and necessary progression in bestowing full citizenship rights on a people previously denied.

"The private schools that were the focus in Runyon did not receive direct federal funds -- but they advertised in the Yellow Pages, sent fliers out through general mailings, and enjoyed tax exemptions. In essence, the schools' status as "private" seemed to be primarily a matter of racial exclusivity, since interested white persons had only

to apply to gain admission.

"The Supreme Court's ruling in Runyon has enabled the exposure and elimination of some of the remaining vestiges of racial discrimination. In the past, by hiding under a cloak of privacy, such institutions were openly able to disregard the civil rights laws. Under sec. 1981 and subsequent interpretations, black Americans are afforded an effective vehicle for challenging these remaining barriers to racial equality.

"As a free and open society, where individual initiative and merit are the espoused criteria for advancement, there should be no place for a policy of exclusion based on one's race or other immutable characteristics. That policy belongs to another time and place from

which we have hopefully evolved. Let there be no equivocation on matters so fundamental to what we have come to know and believe in as the American way.

"For Michael, and others in his generation and those to follow, the Court should uphold the original ruling. Indeed it must -- if we are to continue as a society to move forward."

These words of the McCrarys indicate that Runyon has worked well for them, since 1976. Although only viewed on an individual basis, it would seem that the Court's decision had a beneficial effect. Since the correctness of the Court's 12 year old ruling must involve a "full airing of all the relevant considerations," Justice Powell in Monell, at 709, n 6, Amicus McCrarys offer their personal experience to the

Court.

Because this Court's review of Runyon must of necessity involve the principle of stare decisis, the McCrarys opinion has relevance. As Justice Brandeis has stated in Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 412 (1932), and often thereafter quoted, including in Monell, supra, the reasons for deviating from the straight path of stare decisis should be limited to bringing "opinions into agreement with experience and with facts newly ascertained...." Neither the experience since 1976 or facts newly ascertained since then provides the valid basis for reconsideration of Runyon envisioned by this honored jurisprudential principle. The addition of new justices or the elevation of prior members of the Court

are certainly not the new facts to which Justice Brandeis makes reference.

The legislative history, even though previously known, is relevant. It is, however, but one factor in the calculus of the determination. As both Justices Powell and Stevens pointed out in the original decision in Runyon, the Court at that time was not writing on a clean slate. The time for analysis of the situation by only reviewing the legislative history has passed with the Court's first decision on the Civil Rights Acts where it was determined that a cause of action existed against private acts. (Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) and more specifically for 42 U.S.C. sec. 1981, Johnson, supra). Now the revisit of Runyon must encompass many other factors, as set forth in the

principles of stare decisis. It would be a slim reed to rest a holding which reverses a ruling that works on the same legislative history already analyzed where that history requires a twentieth century interpretation of nineteenth century documents.

As Justice Brennen stated in Monell, 436 U.S. at 695, one factor of stare decisis principle is the consideration of the departure from the prior practice that the decision under review visits on the state of the law at the time of the decision. Here, Runyon was not a departure from prior practice, but rather the determination to allow the McCrarys to have the ability to sue directly the private parties allegedly refusing to contract with them because of their race fit perfectly with judicial

interpretations of other civil rights acts. For example, Sec. 1982 has been interpreted to allow for individual law suits for acts that are strictly private, i.e., not performed by or related to any governmental entity. Jones, supra.

The decision in Runyon was also in step with other civil rights laws providing for the attack on privately practiced racial discrimination. The Fair Housing Act, 42 U.S.C. secs. 3601 et seq., (1982 and Supp IV) allows citizens to initiate legal action by directly confronting those who caused them harm, through the mediation of the legal system, even if that harm was committed solely by a private citizen. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. secs. 2000e et seq. (1982 and Supp IV) also provides an avenue for a

harmed citizen to sue for compensation from one who has committed that harm. Again, the harm could be performed only in the private sector and still be redressable. In both instances, although the government may become involved, it need not be beyond providing the opportunity for resolution of the allegations. If that opportunity is not fruitful, or even if it does not occur, a person still have access to the courts to challenge purely private actions by others.

Runyon, therefore, provides a person the ability to seek restitution in the courts for private discrimination as does other civil rights laws. It is "so consistent with the warp and the woof of civil rights laws as to be beyond question." Runyon, 636 U.S. at 696. Thus,

the Court should have no need to tamper with the decision.

The Runyon decision was also thoroughly consistent with the congressional intent that was apparent in 1976. The same year this Court was again deciding that citizens may sue for privately engendered harmn, Congress was passing the Civil Rights Attorney Fees Award Act, 42 U.S.C. sec 1988 (1982 and Supp IV). That act provides that sucessful private attorneys general can pay the attorneys that were engaged by them to carry forth the claims of discrimination. That act negated the American Rule of attorneys fees awards, as stated in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 260 (1975), as to the specific statute involved here. The congressional intent

to provide fees for successful plaintiffs in a sec. 1981 action certainly does not comport with any interpretation that would limit in any way the ability of private citizens to bring such actions.

Further, regarding the intent of Congress, tacit approval for the decision in Runyon exists. Congress has had ample opportunity to limit the ability of citizens to use sec. 1981 against other private persons. No such action on the part of Congress has occurred, making it clear that private citizens are to be helped, not hindered, in their efforts to obtain this nation's highest priority. The harm of discrimination is viewed by Congress as a leech that should no longer suck the vitality of our populace. Runyon was another weapon for the fight that Congress has joined, and had named the

highest priority. Truly, the Congress was acting as representatives of the people. As Justice Stevens wrote, in Runyon, "For even if Jones did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today."

For the foregoing reasons, Sandra and Curtis McCrary respectfully request this Court to not reconsider its prior decision in Runyon or, alternatively, to uphold its prior decision.

Respectfully submitted,

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